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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1006.

ROOFIRE ALARM COMPANY,

Petitioner,

vs.

ROYAL INDEMNITY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Respondent, Royal Indemnity Company, opposing the petition for writ of certiorari, would respectfully show the Court:

OPINIONS BELOW.

The opinion of the District Court is reported at 202 F. Supp., 166, and that of the Court of Appeals at 313 F. 2d. 635.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED.

Petitioner's "question presented" is unacceptable because based on a misstatement of fact in the preface to the statement, viz: that a "combination in restraint of trade * * * was acknowledged to exist." No such acknowledgment was made because no such combination in restraint of trade existed.

Respondent's "questions presented" are—

1. Does an unlawful "combination in restraint of trade" exist merely because (a) respondent, a fire and casualty insurance company, (i) holds memberships in National Board of Fire Underwriters ("NBFU") and National Fire Protection Association ("NFPA"), (both of which are engaged in fire prevention activities) and (ii) cooperates with NBFU and NFPA (as well as other interested parties) in furthering the cause of fire prevention, and (b) respondent's President was on the Executive Committee of NBFU, and was Chairman of the Board of Trustees of Underwriters' Laboratories, Inc. ("UL"), (a nonprofit testing laboratory engaged in testing fire prevention materials and equipment) and (c) UL, in 1954, refused to list petitioner's earlier model of fire alarm device because it failed to meet UL's standards (in which it was upheld in *Roofire Alarm Co. v. Underwriters' Laboratories, Inc.*, (6 Cir. 1960), 188 F. Supp. 753, 284 F. 2d 360), (d) neither respondent nor any other organization named in the case is alleged to be part of any combination to restrain competition between petitioner and its competitors, and (e) petitioner's device is alleged to be less marketable without UL's listing?

2. Under the facts outlined in question No. 1 above, and where it is agreed no genuine issue exists as to a material fact, was respondent entitled to a summary judgment in its favor?

STATEMENT OF THE CASE.

This suit was filed November 24, 1959, charging respondent with violating 15 U. S. C. § 1 by "act(ing) in concert" with NBFU, NFPA and UL (R. 17a, VI) "in restraint of trade" (R. 18a, VIII). The alleged restraint of trade consisted of NBFU and NFPA suggesting that "the public * * * disregard any fire alarm that is not listed by the Underwriters' Laboratories, Inc." because "an alarm not listed is of doubtful efficacy" (R. 22a), respondent, NBFU, NFPA and UL well knowing that fire alarms not listed by UL "are less marketable" (R. 16a, III). A declaratory judgment was sought "as to legal effect of the concert of action" and an injunction to prevent respondent "from acting in concert with the Underwriters' Laboratories, Inc. in restraint of trade" (R. 18a).

Respondent is a fire and casualty insurance company holding memberships in NBFU and NFPA (R. 1b). Its President was on the Executive Committee of NBFU and was Chairman of the Board of Trustees of UL (R. 7b). It is not in competition with petitioner nor with NBFU, NFPA or UL. Neither NBFU, NFPA nor UL is in competition with petitioner, nor with each other (R. 16b). Respondent does not recommend, approve or disapprove, nor does it have any pecuniary interest in, the manufacture or sale of any particular make or type of fire alarm device (R. 1b, 15b-16b). It is interested in improving fire prevention materials, equipment and procedures and cooperates with NBFU, NFPA, UL and countless other organizations in effort to reduce fire losses (R. 1b).

NBFU is an association of two hundred and three stock fire insurance companies with principal offices at 85 John Street, New York, New York (R. 1b). It is the stock fire insurance company trade association whose purpose, as expressed in its constitution, includes the promotion of

sound underwriting, the adoption and maintenance of up-to-date fire protection measures by municipalities, and others concerned with fire prevention, and the establishment of building construction standards to minimize fire hazards (R. 21b). NBFU sponsors UL and receives annual reports of its operations but grants it no subsidies and makes no donations to it. It has never engaged in the manufacture or sale of fire alarm devices and does not endorse or recommend the purchase of any particular fire alarm device (R. 2b, 15b-16b).

NFPA is an association with its principal offices at 60 Battery March Street, Boston, Massachusetts. Its purpose is to foster, improve and disseminate information concerning the latest developments in fire prevention practices, methods, materials and devices (R. 6b). It has more than two hundred organization members, including, in addition to NBFU, UL and petitioner, such diverse organizations as American Institute of Architects, American National Red Cross, International Brotherhood of Electrical Workers, International Association of Fire Chiefs, Edison Electric Institute, United States Air Force, and the Departments of Agriculture, Army, Interior and Navy of the United States Government. In addition, it has approximately 17,000 associate members of whom more than 2,400 are chiefs of municipal fire departments throughout the United States (R. 1b-2b). NFPA does not approve particular makes of fire protection equipment, materials or devices. On the recommendation of its appropriate technical committees it adopts standards of recommended practices for the installation, maintenance and use of devices and materials having to do with fire protection and prevention (R. 2b). In articles appearing in its several publications and elsewhere it recommends that the public, in purchasing fire protection equipment and devices, insist

on ones which have been listed or approved by such nationally recognized testing laboratories as UL or Factory Mutual Laboratories ("FML") or Underwriters' Laboratories of Canada ("ULC") (R. 8b). It also recommends that the local fire inspection authorities be consulted before fire protection equipment, devices and materials are purchased (R. 2b).

UL is a nonprofit corporation without capital stock, organized under the laws of Delaware and having its principal offices in Chicago, Illinois. It is engaged in testing materials, products and devices from a fire, casualty and crime prevention standpoint. Through its many years of experience it has established certain standards which a product must meet before UL will list it in its publications. Many years ago it established the policy of reporting to the public only on products which testing discloses measure up to its standards. UL receives no other compensation from the manufacturer or submitter except a fee to cover the cost of testing, examination and listing. It neither charges nor receives a royalty or other compensation from the sale of products listed by it, and it does not recommend the purchase of any particular product (R. 2b-4b).

Petitioner, a Tennessee corporation, was incorporated February 15, 1958, and was authorized to begin business with a minimum of $1,000.00 capital. John A. Chambliss, inventor and owner of the patent on the fire alarm device in this suit, subscribed for all the stock but has never made payment for it to petitioner. Petitioner has never had a bank account nor any books of account of any kind, has never had any income and consequently has never filed an income tax return. It has neither written nor oral license covering the patent but Mr. Chambliss explains this

by saying that "it has been licensed in fact because I just operate in that way and write letters about it and try to promote it." (R. 13b.) It has no manufacturing facilities, has never sold any of the devices either within or without the State of Tennessee, although Mr. Chambliss, individually, has made a few sales (R. 12b-14b).

A prior model of the device was submitted to UL in 1954 for testing, and was found not to meet its standards for single station fire alarms. See *Roofire Alarm Co. v. Underwriters' Laboratories, Inc., supra*. The current model of the device is different from the one submitted to UL in 1954, and has never been submitted to UL for testing and consequently UL has never refused to test it (R. 17b-18b).

Respondent was singled out to be sued in this case because (a) its President was Chairman of the Executive Committee of NBFU and Chairman of the Board of Trustees of UL, and (b) John A. Chambliss has, as he expressed it, "What I would call allergies for the Royal group" growing out of previous litigation with respondent (R. 18b-20b). Petitioner's real complaint is UL's failure to list the device in its publications (R. 16b).

Originally Springfield Fire & Marine Insurance Company was the intended defendant because its President was at the time Chairman of the Board of Trustees of UL but before suit was filed he was succeeded as Chairman by Clarke Smith (R. 18b-19b), respondent's President.

On the uncontroverted facts, the judgment of the District Court, and the order of the Circuit Court of Appeals affirming the judgment for the reasons set forth in the opinion of the trial judge, are clearly correct. The case presents no important question under the federal antitrust laws nor can there be any assertion that there is any conflict of decision in the courts below.

ARGUMENT.

I.

THE UNDISPUTED FACTS SHOW THERE IS NO BASIS FOR RELIEF UNDER THE SHERMAN ACT.

Under the heading "Argument" petitioner attempts to build a straw man by asserting that both the District Court and the Court of Appeals held that "a combination in restraint of trade is not violative of the Sherman Act when its motives are pure and its purposes lofty." (Petitioner's Brief, p. 3.) It then proceeds to knock the straw man down with authorities to the contrary.

Neither Court made such a holding, and respondent readily admits that the law is not to that effect. Both Courts held that respondent's activities, as evidenced by the undisputed facts, do not constitute a combination in restraint of trade prohibited by the Sherman Act. (App. Petitioner's Brief, pp. 9-10 and pp. 5-6.)

It is essential to a Sherman Act violation either that interstate commerce be illegally restrained or that there be an illegal restraint of intrastate commerce which results in a direct and substantial restraint of interstate commerce.

In this case there is neither interstate commerce, illegal restraint of interstate commerce, nor illegal restraint of intrastate commerce which results in a direct and substantial restraint of interstate commerce. Petitioner has never manufactured or sold the device either in intrastate or interstate commerce. It is not enough that respondent, UL, NBFU and NFPA, or any one or more of them, may be engaged in interstate commerce. Nor would it be enough if petitioner were engaged in interstate commerce. "The test [ ] is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work* (9th Cir.), 290 F. 2d. 323.

cert. den. 368 U. S. 875, 7 L. Ed. (2d), 76, 82 S. Ct. 121 (1961).

In applying the Sherman Act, not every arrangement or agreement that might in some way have a restraining effect on trade or commerce is illegal, only unreasonable restraints are prohibited. *Standard Oil Co. v. United States* (1910), 221 U. S. 1, 55 L. Ed. 619, 31 S. Ct. 502. The act "was not intended to reach normal and unusual contracts incidental to lawful purposes and intended to further legitimate trade." *Eastern States Retail Dealers' Ass'n v. United States* (1913), 234 U. S. 660, 58 L. Ed. 1490, 34 S. Ct. 951. *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, cited by petitioner involves the baldest type of per se violation of the anti-trust laws, *i.e.*, agreement to fix prices and compel shippers to deal solely with the conspirators. It has no relevance to this case.

Unlike *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U. S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365, cited by petitioner, there is no charge here that the respondent or any other organization mentioned in the suit was capricious, arbitrary, unreasonable or non-objective either in the adoption of standards of safety in the furtherance of fire protection, or the application of the standards to petitioner's device. Nor is there any accusation that the respondent insurance company or any other organization named by petitioner has attempted to restrain competition between the petitioner and the manufacturers of any other fire alarm devices.

Clearly, cooperation among organizations engaged in the furtherance of fire prevention does not constitute a prescribed combination under the anti-trust laws, particularly where it is conceded that the motives and purposes are proper and no claim is made that the stated pur-

poses are being used as a cloak for illegal activity. Where, as here, there is a complete absence of the competitive context, the Sherman Act has no application and the decisions of the Courts below so holding are manifestly correct.

II.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

Petitioner, in two separate suits filed *seriatim*, has twice been before the District Court and the Court of Appeals in connection with suits seeking to require the listing of its fire alarm device. In each instance, a complete record was developed and the discovery procedures of the District Court used to the fullest extent.

While the present case was decided on motion for summary judgment, petitioner has in fact had the equivalent of a full trial. It filed a total of 131 requests for admissions of fact, 126 interrogatories, several requests for admission of genuineness of documents, several affidavits and took the depositions of six witnesses (Opin. District Judge filed November 22, 1960) (R. 9-10b). The District Court carefully considered all facts and found that:

> "No material fact remains in issue and since the plaintiff would not be entitled to relief under the Sherman Act for the reasons stated above, the motion for summary judgment will be granted" (R. 33a-34a).

"Summary judgments have a place in the anti-trust field, as elsewhere * * *." *The White Motor Company v. United States*, U. S. , 9 L. Ed. 2d 738, 744, 83 S. Ct. , decided March 4, 1963, as:

> "[T]here can be no doubt that summary judgments are as applicable to actions under the Sherman Act as they are to any other type of actions, legal or equi-

table. Associated Press v. United States, 1945, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013; Morton Salt Co. v. G. S. Suppiger Co., 1942, 314 U. S. 488, 315 U. S. 788, 62 S. Ct. 402, 86 L. Ed. 363; International Salt Co. v. United States, 1947, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20; United States v. United States Gypsum Co., 1950, 340 U. S. 76, 71 S. Ct. 160, 95 L. Ed. 89." *United States v. Krasnov* (E. D. Pa.), 143 F. Supp. 184, 197; aff'd 355 U. S. 5, 2 L. Ed. 2d 21, 78 S. Ct. 34.

The disposition of each case involving a motion for summary judgment turns on the question whether a genuine factual dispute is present. In cases where, after complete discovery procedure, all the facts are available without dispute, summary judgment is warranted. *Kentucky Rural Elec. Co-Op. Corp. v. Moloney Elec. Co.* (W. D. Ky. 1959), 175 F. Supp. 250, aff'd (6th Cir. 1960), 282 F. 2d 481, cert. den. 365 U. S. 812, 5 L. Ed. 2d 691, 81 S. Ct. 692, reh. den. 365 U. S. 855, 5 L. Ed. 2d 820, 81 Ct. 799 (1961), (on depositions, affidavits, charters, by-laws and other exhibits); *Feldman v. Miller*, 220 F. 2d 826 (D. C., 1955) (depositions, interrogatories and a transcript); *Page v. Work*, 290 F. 2d 323 (9th Cir., 1961), cert. den. 368 U. S. 875; 7 L. Ed. 2d 76, 82 S. Ct. 121 (30 pages of admitted facts from exhibits, depositions, admissions and interrogatories); *Marion County Cooperative Association v. Carnation Co.*, 214 F. 2d 557 (8th Cir., 1954) (undisputed facts in affidavits, plaintiff not offering any counterproof or impeaching them); *Saron Gas Stations No. 6, Inc. v. Shell Oil Co.*, 309 F. 2d 306, cert. den. U. S. 9 L. Ed. 2d 719, S. Ct. (affidavits and interrogatories). In all of these cases it was determined, as in the instant case where comprehensive discovery procedures have resulted in eliminating all issues of fact, that the case was ripe for disposition by summary judgment.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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